DJ Design & Supplies Sdn Bhd v Public Bank Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1-12-354-95
ABDUL KADIR SULAIMAN J
14 DECEMBER 1996

Civil Procedure *— Appeal — Notice of — Appeal against decision of magistrate allowing application of respondent for summary judgment — Notice of appeal filed in Magistrate's Court Registry — Whether notice of appeal should be filed in the Registrar of the High Court — Whether appeal properly brought — Subordinate Court Rules 1980 O 49 r 6(2)*

The appellant filed a notice of appeal at the Magistrate's Court Registry against the decision of the magistrate allowing the application of the respondent for summary judgment under O 26A of the Subordinate Court Rules 1980 ('the SCR'). Before the hearing commenced, the respondent raised a preliminary objection that the notice of appeal was filed in the Magistrate's Court Registry in respect of a decision made under O 26A of the SCR which was a decision made other than that made after trial; and on the authority of *Datuk Bandar Kuala Lumpur v Seman bin Amat & Ors* [1993] 3 CLJ 263, it ought to be struck out.

Held, striking out the appeal:

The procedure prescribed by O 49 r 6 of the SCR must be strictly adhered to. By r 6(2), an appeal against a decision other than a decision made after trial is considered to be brought properly only if the notice of appeal is filed in the Registrar of the High Court eventhough the decision is that of a subordinate court. If the appeal is not so properly brought, it is not within the jurisdiction of the judge in chambers to hear such an appeal. By not filing the notice of appeal with the Registrar of the High Court as required by r 6(2), the intended appellant here had not obeyed the rules of court (see pp 468F, I and 469A–B); *Datuk Bandar Kuala Lumpur v Seman bin Amat & Ors* [1993] 3 CLJ 263, *Dairy Maid Resort & Recreation Sdn Bhd v Promet Bhd* (Civil Appeal No R1-12-224-95, unreported) and *Scott & English (Malaysia) Sdn Bhd v Setia Hati Sdn Bhd* (Civil Appeal No R1-12-144-95, unreported) followed; *Pandan Maju Sdn Bhd v Dulon Industries Sdn Bhd* [1995] 4 MLJ 737 and *Tan Wee Choon v Tan Kee Kiat (M) Sdn Bhd* (Civil Appeal No 12-22-1995, unreported) not followed.

Obiter:

Order 49 r 6 of the SCR determines the forum to hearing the appeal, which is to a judge in chambers, and only concerns with that decision made by the subordinate courts other than a decision made after trial. A decision made under O 26A of the SCR which is summary in nature is such a decision envisaged by O 49 r 6 of the SCR (see p 468E).

[Bahasa Malaysia summary

Perayu memfailkan notis rayuan di Pejabat Pendaftaran Mahkamah Majistret terhadap keputusan majistret yang membenarkan permohonan penentang untuk penghakiman terus di bawah A 26A Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'). Sebelum perbicaraan bermula, penentang menimbulkan bantahan permulaan bahawa notis rayuan itu difailkan di Pejabat Pendaftaran Mahkamah Majistret berkaitan dengan keputusan yang dibuat di bawah A 26A KMR yang merupakan keputusan yang dibuat selain daripada yang dibuat selepas perbicaraan; dan atas autoriti *Datuk Bandar Kuala Lumpur v Seman bin Amat & Ors* [1993] 3 CLJ 263, ia patut dibatalkan.

Diputuskan, membatalkan rayuan:

Prosedur yang ditetapkan oleh A 49 k 6 KMR mesti dipatuhi dengan ketat. Mengikut k 6(2), rayuan terhadap keputusan selain daripada keputusan yang dibuat selepas perbicaraan dianggap dibawa dengan wajar hanya jika notis rayuan difailkan di Pejabat Pendaftaran Mahkamah Tinggi walaupun keputusan itu adalah daripada mahkamah rendah. Jika rayuan itu tidak dibawa dengan wajar, ianya tidak berada dalam bidang kuasa hakim dalam kamar untuk mendengar rayuan sedemikian. Dengan tidak memfailkan notis rayuan itu dengan Pendaftar Mahkamah Tinggi seperti yang dikehendaki oleh k 6(2), perayu yang berhasrat untuk membuat rayuan di sini telah tidak mematuhi kaedah-kaedah mahkamah (lihat ms 468F, I dan 469A–B); *Datuk Bandar Kuala Lumpur v Seman bin Amat & Ors* [1993] 3 CLJ 263, *Dairy Maid Resort & Recreation Sdn Bhd v Promet Bhd* (Civil Appeal No R1–12–224–95, unreported) dan *Scott & English (Malaysia) Sdn Bhd v Setia Hati Sdn Bhd* (Civil Appeal No R1–12–144–95, unreported) diikut; *Pandan Maju Sdn Bhd v Dulon Industries Sdn Bhd* [1995] 4 MLJ 737 dan *Tan Wee Choon v Tan Kee Kiat (M) Sdn Bhd* (Civil Appeal No 12–22–1995, unreported) tidak diikut.

Obiter:

Aturan 49 k 6 KMR menentukan forum untuk mendengar rayuan, iaitu kepada hakim dalam kamar, dan hanya berkenaan dengan keputusan yang dibuat oleh mahkamah rendah selain daripada keputusan yang dibuat selepas perbicaraan. Keputusan yang dibuat di bawah A 26A KMR yang bersifat ringkas adalah keputusan seumpamanya yang dibayangkan oleh A 49 k 6 KMR (lihat ms 468E).]

Notes

For cases on notice of appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 567–602 and 699.

Cases referred to

Dairy Maid Resort & Recreation Sdn Bhd v Promet Bhd (Civil Appeal No R1–12–224–95, unreported) (folld)

Datuk Bandar Kuala Lumpur v Seman bin Amat & Ors [1993] 3 CLJ 263 (folld)
Pandan Maju Sdn Bhd v Dulon Industries Sdn Bhd [1995] 4 MLJ 737 (not folld)
Scott & English (M) Sdn Bhd v Setia Hati Sdn Bhd (Civil Appeal No R1–12–144–95, unreported) (folld)
Seman bin Amat & Anor v Datuk Bandar Kuala Lumpur (Civil Appeal No R2–11–62–96, unreported) (refd)
Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420 (refd)
Tan Wee Choon v Tan Kee Kiat (M) Sdn Bhd (Civil Appeal No 12–22–1995, unreported) (not folld)

Legislation referred to

Subordinate Courts Rules 1980 O 49 rr 6, 6(2), O 26A, Form 140

Thangaraj Balasundram (*Thangaraj & Associates*) for the appellant.
Chua Eng Siong (*Iza Ng Yeoh & Kit*) for the respondent.

Abdul Kadir Sulaiman J: This is yet another effort made by an aggrieved party to persuade me to have a second look at my decision made in *Datuk Bandar Kuala Lumpur v Seman bin Amat & Ors* [1996] 3 CLJ 263 ('*Seman*'s case'), in the light of other High Court decisions which appear to differ from my said decision. In my said decision, I held that pursuant to O 49 r 6 of the Subordinate Courts Rules 1980 ('the SCR') an appeal from a decision of a subordinate court other than a decision made after trial is not properly brought if the notice of appeal in respect of such decision is not filed with the Registrar of the High Court as required by sub-r (2) thereof. If it is not so brought, it does not confer jurisdiction upon the judge in chambers to hear such an appeal.

The appellant in this case before me now was the defendant in the court below. It filed a notice of appeal on 29 December 1995 at the magistrates' court registry against the decision of the learned magistrate given on 28 December 1995 allowing the application of the respondent/plaintiff for summary judgment under O 26A of the SCR. Soon after the filing of the notice of appeal, the appellant filed the record of appeal and the memorandum of appeal. The appeal was, therefore, finally scheduled for hearing on 22 October 1996. Before the hearing commenced, the learned counsel for the respondent raised a preliminary objection that the notice of appeal in this case was filed in the Magistrates' Court Registry in respect of a decision made under O 26A of the SCR which is a decision made other than that made after trial; and on the authority of *Seman*'s case — which also concerned the decision made other than that made after trial — it ought to be struck out. In reply, the learned counsel for the appellant merely cited *Tan Wee Choon v Tan Kee Kiat* (Civil Appeal No 12–22–95) (High Court, Melaka) and also informed the court that a week ago he had written to the Court of Appeal for an early hearing date of an appeal against the decision of another judge of the High Court at Kuala Lumpur in Civil Appeal No R3–12–283–95 filed in July 1996 and therefore requested

for a mention date for this present appeal to December 1996. In final reply, the learned counsel for the respondent objected to the request, pointing out that the decision on the matter in *Seman*'s case is very clear and insisted on the dismissal of this appeal with costs.

Having considered the matter, I thought that it would not serve a useful purpose to adjourn the matter as the position in relation to Civil Appeal No R3–12–283–95 is not at all clear as to when it would be disposed of by the Court of Appeal; in the meantime, cases are piling in the High Court on similar appeals. Firm with my decision in *Seman*'s case and a few other decisions on similar matters that came before me subsequent to that, I made an order striking out the appeal of the appellant with costs to the respondent on the ground that the appeal was not properly brought pursuant to O 49 r 6 of the SCR. If my decision on the issue raised in *Seman*'s case is held to be wrong by the Court of Appeal, those concerned appeals would be restored in the list for hearing.

Rule 6 was inserted into O 49 of the SCR pursuant to PU(A) 193/93 which took effect from 1 August 1993. The intention was to create a separate procedure for appeals to the High Court from a decision of the subordinate courts depending on whether the decision appealed from came about after a trial or otherwise. Hitherto, the procedure for appeal was common in respect of both types of decision. The new O 49 r 6 determines the forum to hear the appeal — which is to be before a judge in chambers — and only concerns that decision made by the subordinate courts other than a decision made after trial. A decision under O 26A which is summary in nature is such a decision envisaged by O 49 r 6 of the SCR. I had so decided in *Seman bin Amat & Anor v Datuk Bandar Kuala Lumpur* in Civil Appeal No R2–11–62–96 (unreported). By r 6(2), an appeal against such a decision is considered to be brought only if the notice of appeal is filed with the Registrar of the High Court even though the decision is that of a subordinate court. The procedure is not as elaborate as that prescribed for appeal against the decision of the subordinate court made after trial which is still governed by the relevant rules preceding r 6 of O 49. The content of the record of appeal is similarly simplified by not requiring the inclusion of the notes of evidence, the grounds of judgment or any memorandum of appeal: see r 6(3) thereof. The rule caters for interlocutory decisions of the subordinate court as opposed to decisions made after full hearing of the cause or matter. The objective of O 49 r 6 is to reduce delay in the disposal of the appeal by the judge in chambers. As for an appeal against the summary decision made under O 26A of the SCR if the result of the appeal is in favour of the appellant, the cause or matter before the subordinate court will proceed to a full trial. The elaborate procedure required of an appeal against the decision made after trial will defeat the objective of a quick disposal of an interlocutory appeal.

Such being the case, the procedure prescribed by O 49 r 6 must be strictly adhered to. The appeal is not considered to have been brought if no notice of appeal is filed with the Registrar of the High Court. If the appeal is not so properly brought, it is not within the jurisdiction of the

judge in chambers to hear such an appeal. Rules of court are to be obeyed. Failure to comply with them will lead to chaos in the conduct of litigation: see *Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 (SC). So, by not filing the notice of appeal with the Registrar of the High Court as required by r 6(2), the intended appellant here had not obeyed the rules of court.

Since my said decision in *Seman*'s case, I have come across at least two High Court decisions which are contrary to mine. They are *Pandan Maju Sdn Bhd v Dulon Industries Sdn Bhd* [1995] 4 MLJ 737, a decision of my learned brother Low Hop Bing J; and *Tan Wee Choon v Tan Kee Kiat (M) Sdn Bhd* (Melaka High Court Civil Appeal No 12–22–1995, unreported), a decision of my learned brother Augustine Paul JC. I had occasion to make observations in relation to those two cases in *Scott & English (M) Sdn Bhd v Setia Hati Sdn Bhd* (Civil Appeal No R1–12–144–95, unreported) and *Dairy Maid Resort & Recreation Sdn Bhd v Promet Bhd* (Civil Appeal No R1–12–224–95, unreported). The respective decisions of my learned brothers centred around the requirement of O 49 r 6(2) itself that the notice of appeal must be in Form 140, a form of notice of appeal which is required to be used also for an appeal against a decision made after trial by O 49 r 2(1) of the SCR. As the said Form made no provisions for the address of the Registry of the High Court but only for the addresses of the magistrate and the Registrar of the Sessions Court, my two learned brothers were of the view that it is proper for the notice of appeal in respect of decisions made by the court other than a decision made after trial to be filed with the magistrate or the Registrar of the Sessions Court, depending on where the decision originated. Even in *Seman*'s case, submissions were made concerning the use of this common Form 140 in respect of both nature of appeals. I said at p 270 that if the filing of the notice of appeal is to be with the Registrar of the High Court, Form 140 is to be used with the necessary variation as to the address printed therein. This is allowed by O 1 r 8 as the circumstances of the case require that the notice of appeal be filed with the Registrar of the High Court. In *Scott & English*, I had said:

> It is true that the address of the registry in Form 140 makes provisions only for the Registrar of the Sessions Court and the magistrate (as the case may be). This Form was prescribed before the coming into force of O 49 r 6 of the SCR. At the time of its prescription, it was never in the contemplation of the legislature that sometime in the future O 49 r 6 is to be incorporated. In any event, the general law, the Interpretation Acts 1948 and 1967 and O 1 r 8 of the SCR itself made provisions for this contingency. On 1 August 1993, that contingency happened. Once that happened, the general law and O 1 r 8 of the SCR came into play ... . The circumstances of the particular case by the operation of O 49 r 6 of the SCR require that the said Form 140 be varied to enable the notice of appeal to be filed with the Registrar of the High Court. Another aspect of the matter is this: a prescribed form cannot override the express provisions of the principal rule requiring the use of a certain Form for the purpose of carrying into effect the requirement of the principal rule, particularly so when variations are allowed to suit the circumstances of the particular case.

As for the matter before me now, I would affirm what I have said in the two cases mentioned above and would hold on the authority of the two cases and *Seman*'s case. For that reason, I upheld the preliminary objection raised by the learned counsel for the respondent and also upon the jurisdictional issue, I struck out this appeal of the appellant.

Order accordingly.

Reported by Eugene Lee Hong Whye